No. 84-571

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

HARRY N. WALTERS, ADMINISTRATOR OF VETERANS' AFFAIRS, et al.,
Appellants,

VS.

NATIONAL ASSOCIATION OF RADIATION SURVIVORS, et al.
Appellees.

On Appeal from the United States District Court for the Northern District of California

BRIEF FOR THE LAWYERS' CLUB OF SAN FRANCISCO AS AMICUS CURIAE IN SUPPORT OF APPELLEES

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The Lawyers' Club of San Francisco, a voluntary bar association composed of more than 1,500 San Francisco attorneys, files this brief *amicus curiae* with the consent of the parties pursuant to the Rules of this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case raises the question of whether prohibiting applicants for veterans' benefits from paying a fee of more than $10 to an agent or attorney with respect to a benefit claim violates their First Amendment right to petition the government and Fifth Amendment right to procedural due process. Although the Lawyers' Club of San Francisco agrees generally with appellees' arguments on both the First and Fifth Amendment issues, we believe that two particular matters warrant further analysis.

First, appellants argue at length that the courts' traditional deference to statutorily designated hearing procedures precludes any substantial factual inquiry into whether denying claimants the right to hire an attorney or agent impairs their ability to pursue their benefit claims. At the same time, however, appellants also argue that because the administrative procedures are in fact "fair and effective without privately retained attorneys," there is no need to consider the contention that the First Amendment right to seek redress is being infringed. Appellants' First Amendment argument is inconsistent with their position regarding the scope of judicial review. Because of the importance of the First Amendment rights at stake when the government seeks to prohibit a private party from retaining counsel to prosecute a claim against it, a high degree of judicial scrutiny into the basis for the restriction is warranted. The court below properly considered the evidence in the record showing that denying the right to retain counsel abridged claimants' ability to present their cases effectively.

Second, appellants' argument that prohibiting claimants from hiring attorneys or agents comports with procedural due process rests on the assertion that the participation of such lawyers and agents would be fundamentally incompatible with the existing "informal and nonadversarial claims system." This contention is refuted by the fact that a claimant's right to representation, by both attorneys and agents, is now expressly permitted "at all stages of the administrative process." Moreover, what appellants describe as "skilled and expert" professional claims representatives supplied by veteran organizations, as well as *pro bono* lawyers, now represent many claimants throughout the claims process. In light of this existing system of claimant representation, a prohibition on the retention of paid representatives improperly denies veterans their due process "right to the aid of counsel when desired and provided by the party asserting that right." *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

ARGUMENT

I.

This case poses the question of whether the government may prohibit a private party from retaining counsel to assist in prosecuting a claim against it. That question raises issues concerning both the right to petition the government guaranteed by the First amendment[1] and the right to procedural due process guaranteed by the Fifth Amendment.[2]

Appellants, however, attempt to obscure these two constitutional issues by blending them together. They argue on the one hand that the courts' traditional reluctance to question the wisdom of Congress severely limits any judicial inquiry into whether the prohibition on retaining private counsel deprives Veteran Administration ("VA") claimants of a fair and effective procedure for litigating their cases. Brief for Appellants ("VA Br.") at 33-46. At the same time, however, appellants also argue that because "the existing VA claims procedure is [in fact] fair and effective without privately retained attorneys, there is no basis in the First Amendment for inferring a right to counsel as necessary to effectuate" the First Amendment right to petition for redress of grievances. VA Br. at 47. Thus, by using a presumption of regularity applied in substantive due process cases,[3] appellants attempt to shield the First Amendment issues in this case from judicial scrutiny.

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[1] This Court has held that the right of speech and petition includes the right to seek civil and administrative remedies. *See, e.g., California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972); *NAACP v. Button*, 371 U.S. 415 (1963). It has also held that the right to litigate civil grievances can be infringed by denying a party (or others acting on his behalf) the right to engage and compensate counsel of his choice. *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576 (1971); *United Mine Workers v. Illinois Bar Ass'n*, 389 U.S. 217 (1967).

[2] *See* Part II, *infra*.

[3] In noting that statutory claims procedures are entitled to a measure of judicial deference, we do not disagree with the District Court's

In our view, the relationship between the First and Fifth Amendment aspects of this case mandates a substantially different approach to determining whether factual questions concerning "the working of the VA benefit system," VA Br. at 38, could be considered in this case. Since, as appellants concede, the First Amendment issue turns on whether VA claimants are in fact afforded a "fair and adequate [procedure] without retained attorneys," VA Br. at 47, the District Court was obliged to consider that issue directly, rather than merely deferring to any presumptions of fairness that might attend statutory hearing procedures in other contexts. Any other approach to this case would, in our view, give too little importance to the First Amendment interests at stake when the government attempts to restrict the right of citizens litigating claims against it to secure legal representation.

After reviewing the factual record below, we agree with the District Court's finding that the overbroad limit on attorney's fees that may be paid voluntarily by veterans in service-connected death and disability cases, regardless of the nature, sophistication or intricacy of the issues involved, deprives substantial numbers of them of a "fair and effective" means of presenting their claims. J.S. App. 20a-38a. Accordingly, we fully support the District Court's ruling that the restriction on claimants' right to employ private counsel in such cases violates the First Amendment.

II.

Although a party's right to appear through legal counsel in civil matters is not absolute, it has historically been considered an important element of procedural due process. As the Court stated in *Powell v. Alabama*, 287 U.S. at 69-70:

> What, then, does a hearing include? Historically, and in our practice, in our own country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right. The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. . . . If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing before him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and therefore, of due process in the constitutional sense.

conclusion that any presumption of fairness was rebutted by the evidence presented in this case.

Recent cases in this Court have attached increased importance to the availability of legal representation in civil matters. For example, the issue of whether indigents in certain civil proceedings are entitled as a matter of due process to be furnished *appointed* counsel paid for by the state has sharply divided the Court in recent years. *E.g.*, *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981) (termination of parental rights); *Vitek v. Jones*, 445 U.S. 480 (1980) (involuntary transfer to mental hospital); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (parole revocation); *In re Gault*, 387 U.S. 1 (1967) (juvenile delinquency determination). Although the Court's conclusion regarding the requirement of appointed counsel has varied with the particular facts and circumstances presented, all of these cases have approached the question from the premise that legal representation in civil adjudicatory proceedings contributes substantially to the fairness of the process.

There are, to be sure, a small number of situations where an individual may be denied the right to retain legal representation, even at his own expense. For example, in *Gagnon v. Scapelli*, 411 U.S. 778, 787 (1973), the Court held that parole or probation could be revoked without the presence of an attorney because "[t]he introduction of counsel into a revocation proceeding will alter significantly the nature of the proceeding." *See also Baxter v. Palmigiano*, 425 U.S. 308 (1976).[4] In *Middendorf v. Henry*,

[4] In holding that inmates in prison disciplinary hearing were not entitled to a lawyer, the Court in *Baxter* noted that changes in the hearing process in future years might "require further consideration and reflection of this Court." 425 U.S. at 324, quoting *Wolff v. McDonnell*, 418 U.S. 539, 572 (1974). The history of the procedure for adjudicating claims for veterans' service-connected death and disability

425 U.S. 25, 45 (1976), the Court held that the right to counsel could be denied in a summary court-martial because "presence of counsel will turn a brief, informal hearing which may be quietly and conveniently and rapidly concluded into an attenuated proceeding. . . ." In each of these instances, however, the Court has reiterated that the presence of counsel was incompatible with the orderly operation of the institution in question. As the Court stated in *Wolff v. McDonnell*, 418 U.S. at 560, "one cannot apply procedural rules designed for free citizens in an open society to the very different situation presented by a disciplinary proceeding in a state prison."[5]

In the present case, appellants do not question that the effect of 38 U.S.C. § 3404 is to deny VA claimants the right to retain private counsel. J.S. App. 22a.[6] They argue, however, that the VA service-connected death and disability benefit process is an "informal and nonadversarial claims system" and that the participation of privately retained claimant representatives would "alter substantially the nature of the proceeding." VA Br. at 30. There are, however, two basic flaws in this contention.

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benefits shows a substantial evolution since the predecessor of 38 U.S.C. § 3404 was enacted in 1862. At that time, filing a claim consisted merely of filling out forms, and the $10.00 fee limitation served "to protect veterans from extortionate fees for mere clerical assistance." *Smith v. United States*, 83 F.2d 631, 604 (8th Cir. 1936). Beginning in the 1930's, however, the procedure evolved into an extensive system of hearings and other adjudicatory processes. *See* Appendix I to the Brief for Appellees.

[5] Another situation where retained counsel may be denied is where the proceeding is either voluntary or subject to review in a subsequent hearing where counsel is allowed. *See, e.g., Middendorf v. Henry*, 425 U.S. at 46-47. Under 38 U.S.C. § 211(a), no subsequent judicial review of a VA determination is available.

[6] In *Vitek v. Jones*, 445 U.S. at 499, Justice Powell stated that procedural due process could be satisfied in certain cases by the appointment of a lay representative rather than a lawyer. Under 38 U.S.C. § 3404, the $10.00 fee limitation applies to non-lawyer agents as well as attorneys.

First, appellants' characterization of the "nonadversarial" VA claims process as being antithetical to the presence of counsel does not square with the VA's own administrative procedures. A claimant's right to representation, both by attorneys and agents, is in fact permitted by VA regulations "at all stages of the administrative process." VA Br. at 8; *see* 38 C.F.R. §§ 3.103(d); 17.150. As appellants note in their brief, professional claims representatives, supplied by veterans' organizations, represent many claimants throughout the VA's administrative proceeding, providing them with what appellants describe as "sophisticated and expert assistance in processing a claim." VA Br. at 29. Lawyers, serving as volunteers, *pro bono* counsel or legal aid attorneys, in fact appear in claims cases. VA Br. at 9.

The existence of a comprehensive procedure for claimant representation belies appellants' assertion that the presence of paid representatives would conflict with the VA's adjudicatory process. Appellants offer no explanation, let alone any evidence, of why paid counsel or agents would differ in any relevant respect from the attorneys or agents who represent VA claimants without charge. Appellants' argument that right to retain and compensate counsel would "fundamentally alter" VA procedures is without basis.

Second, the mere fact that VA administrative adjudications are "informal" or "nonadversarial" does not mean that the right to counsel is no longer a necessary ingredient of procedural due process. The terms "informal" and "nonadversarial" are typically applied to a variety of governmental benefit adjudications, such as those in the Social Security disability, unemployment insurance and welfare systems. *See Mathews v. Eldridge*, 424 U.S. 319, 339 (1976); *Fusari v. Steinberg*, 419 U.S. 379 (1975); *Goldberg v. Kelly*, 397 U.S. 254 (1970). While the "informal" character of these proceedings may warrant departing from such courtroom-type procedures as confrontation and cross-examination, *see Mathews v. Eldridge*, 424 U.S. at 348, it has never been held to justify the denying a claimant the right to retain legal counsel. To the contrary, in *Goldberg v. Kelly*, 397 U.S. at 270, the Court expressly held that a benefit recipient "must be allowed to retain an attorney if he so desires" in order for the

informal procedure to satisfy due process requirements.[7] After all, the purpose of the informal hearing "is to permit the claimant to present any evidence or arguments that bear on the claim," VA Br. at 6, not to avoid arguments or bar evidence.

Thus, the "informal" and "nonadversarial" nature of the VA benefits system does not warrant denying claimants their ordinary due process right to employ legal counsel to assist in presenting their case. The special considerations that have justified denying prison inmates, parolees and military personnel facing summary courts-martial the right to retain an attorney do not apply to persons applying for VA benefits. Disabled veterans are not only "free citizens in an open society," *Wolff v. McDonnell*, 418 U.S. at 560, they have earned their right to benefits in performing their military service. *Cf. California Department of Human Resources Department v. Java*, 402 U.S. 121, 131-32 (1971). A veteran, no less than a welfare recipient or a Social Security disability claimant, should be "allowed to retain an attorney if he so desires." *Goldberg v. Kelly*, 397 U.S. at 270; *cf. Mathews v. Eldridge*, 424 U.S. at 339, 349.

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[7] The Court in *Mathews v. Eldridge* reiterated that the claimant's right to counsel was an important factor in favor of permitting "informal" hearing procedures. 424 U.S. at 334, 349.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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